

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MONA S. CARTHEL
Claimant

VS.

KEY MANAGEMENT COMPANY
Respondent

AND

AMERICAN HOME ASSURANCE
Insurance Carrier

Docket Nos. 1,013,468;
1,017,171; 1,017,386

ORDER

Both respondent and claimant requested review of the February 26, 2007 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on June 5, 2007.

APPEARANCES

Stephen J. Jones, of Wichita, Kansas, appeared for the claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Although the claimant alleged 3 separate accidents and a variety of resulting injuries and impairments, the ALJ concluded the claimant was injured out of and in the course of her employment with the respondent beginning May 24, 2003 and each and every working

day through September 23, 2003, the date claimant could no longer work and went on medical leave.¹ The ALJ found that the claimant's work-related injuries were limited to her upper extremities and adopted the opinions of Dr. Mills, awarding claimant a 12 percent functional impairment to the whole body, based upon two separate scheduled impairments of 10 percent to each upper extremity. The ALJ went on to find that the claimant was fired from her job with the respondent for no just cause and that the claimant is entitled to a permanent partial general (work) disability of 56.5 percent.

The respondent has appealed the Award and asserts a variety of issues. First, respondent contends claimant failed to establish that she suffered an accident arising out of and in the course of her employment on the dates alleged. However, at oral argument, it became clear that the true issue is not whether claimant established a work-related accident, but rather, the dispute between the parties stems from the nature of claimant's physical complaints, diagnoses and their connection to her work activities and alleged accidents. Simply put, the issue to be decided is the nature and extent of claimant's work-related injury or injuries attributable to her 3 separate accidents. And depending on the dates of accident, her average weekly wage is in dispute.

Respondent argues that the Board should affirm that portion of the ALJ's Award that grants claimant benefits based upon a repetitive injury to each of her upper extremities. However, based upon Kansas Supreme Court's recent pronouncement in *Casco*², respondent maintains claimant's recovery is limited to two separate scheduled injuries rather than a whole body impairment. Thus, respondent contends the Award should be modified to reflect a 10 percent permanent partial impairment to each of claimant's upper extremities.

As for the balance of claimant's alleged injuries, respondent argues that claimant has failed to establish a causal connection between her physical complaints and her alleged work injuries. And even if claimant has established a connection between her back complaints and her alleged work injury or injuries, a work disability is not appropriate. Respondent maintains claimant has failed to meet her burden of proving an appropriate task loss, she was terminated for cause and has not made a good faith effort to find appropriate employment. Thus, any work disability award should be less than that awarded by the ALJ.

¹ ALJ Award (Feb. 26, 2007) at 4.

² *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh. denied* (May 8, 2007).

Claimant has also appealed the ALJ's Award and contends that only Dr. Murati provided a thorough examination of her and all of her physical complaints. Claimant maintains not only is she entitled to the 12 percent permanent partial impairment as a result of her upper extremity claim, but she is also entitled to an additional 23 percent for her cervical, thoracic and lumbar spine complaints and 5 percent to her knee, all as a result of her work-related injuries. Moreover, based upon Dr. Murati's task loss opinion, claimant bears a 23 percent task loss each as a result of her upper extremity claim and her mid and low back claim(s). And when coupled with her 100 percent wage loss, which she contends she sustained as a result of her improper termination from her job, claimant is entitled to a 61.5 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as a property manager beginning in 2001. She was charged with overseeing several apartment complexes which included a variety of duties, such as cleaning out the apartments and performing some maintenance, including painting. Claimant alleges she sustained 3 separate accidents while in respondent's employ.

The first series of accidents is alleged to have occurred beginning in November 2002.³ Claimant testified she was in the process of cleaning out some apartments over a period of days and on November 25, 2002 she woke up with neck pain. She was also having right arm pain during this period. Claimant notified her employer and sought treatment through her own family physician. She continued to have ongoing medical treatment and evaluations and all the while, maintained her job performing her work duties.

On September 23, 2003, claimant went on medical leave. There is no medical opinion within the file that indicates why claimant stopped working although there are musings in the record about claimant's back problems inhibiting her ability to do her work activities. She returned to work on January 19, 2004 when she began working part-time. The reason for the decision for claimant to return on a part-time rather than a full-time basis is largely unexplained in the record. It seems to have been a mutual decision but there is no medical record that compels claimant to limit her work activities, nor explains

³ This forms the basis for Docket No. 1,013,468 and alleges a series of accidents from November 25, 2002 and continuing.

the need for the limitation, other than her inability to get up early in the morning. It is clear, however, that claimant returned to work at a job that kept her in the office and required her to work on the computer and complete paperwork. There is no challenge to the contention that this was an accommodated position, providing claimant with less strenuous work.

As a result of this part-time work, claimant's wages were decreased, but the respondent continued to provide her with an apartment. When working full-time, claimant's average weekly wage included \$330 in wages and the value of the rent on her apartment, \$82.15. She also received fringe benefits and according to the only evidence in the record, these fringes were valued at \$267.50 per week.⁴ When she returned to work on January 19, 2004, her wages decreased to \$165 per week. Thus, at full-time, claimant's average weekly wage was \$679.65 and at part-time, her average weekly wage was \$514.65.

Then on May 24, 2004, claimant was walking towards a tenant in the parking lot and fell, injuring her left knee and she has testified that her neck and arm pain got worse following this event⁵. Claimant has never received any treatment for her knee, but her other complaints continued as did her part-time work duties.

Claimant maintains that she sustained another series of accidents resulting in an injury to each of her upper extremities and shoulders as a result of all of her work activities, including this last period of work.⁶

There are a number of physicians who have examined claimant at various times and offered a plethora of opinions. Distilled to their essence, the physicians all seem to agree that claimant has sustained a repetitive series of injuries to her upper extremities. Dr. Philip Mills was appointed as an independent medical examiner. Following an examination in May 2004, he opined that claimant had bilateral carpal tunnel syndrome and ulnar nerve entrapment. He assigned a 10 percent permanent partial impairment to each upper

⁴ This figure is contested by respondent. At his deposition, Alan Huffman confirmed that the value of fringes benefits was \$267.50 *per week*. Although respondent's counsel contends this is an exorbitant sum and most certainly should have been a monthly figure, the only evidence (which came from respondent's own representative) in the record indicates otherwise. Thus, the figure \$267.50 per week will be used.

⁵ This forms the basis for Docket No. 1,017,171. There is no challenge to the underlying compensability of this event.

⁶ This forms the basis for Docket No. 1,017,386 and alleges a claim for a series of injuries ending on the last date worked.

extremity, which when converted and combined, pursuant to the *Guides*⁷, yields a 12 percent impairment to the body as a whole.

From this point, the medical opinions begin to vary widely. Claimant was treated by Dr. Paul Stein beginning in December 2003. At this point claimant's complaints were pain in her neck, upper back, right arm, both hips and thighs. Following a series of tests, including an EMG and nerve conduction tests (which were both negative), Dr. Stein concluded that claimant's neck and lower back symptomatology were unrelated to any work accident and in fact, were preexisting. A CT scan and a myelogram revealed a mild bulge of the disc at C6-7, but Dr. Stein did not feel there was any impingement of the nerve roots and he could not make a diagnosis of cervical radiculopathy.

At respondent's request claimant was seen by Dr. Chris Fevurly in October 2003. Dr. Fevurly testified that claimant's headaches and neck pain were unrelated to her work activities. He confirmed claimant's bilateral carpal tunnel complaints, but because the symptoms were not supported by EMG results, he was unwilling to assign any permanent impairment as a result of that condition. Nonetheless, he did acknowledge an exacerbation of these complaints based upon her work activities.

Dr. Pedro Murati evaluated claimant in March 2005 and identified permanent impairment in claimant's upper extremities (19 percent whole body impairment) along with permanent impairment in her neck (15 percent), thoracic (5 percent) and lumbar (5 percent) areas of the spine. This collective 23 percent to the spine is, according to Dr. Murati, attributable to claimant's first accident and is independent of the 5 percent to the knee, attributable to the May 24, 2004 accident, and the 19 percent to the upper extremities which he finds is attributable to the series of accidents.

Dr. Stein saw claimant again in June 2006 and again diagnosed mild cervical disc disease at C6-7, but concluded this condition preexisted claimant's employment with respondent. Dr. Stein went on to opine that claimant had cumulative trauma soft tissue injuries to her upper extremities with a possible peripheral nerve entrapment but due to the negative test results available to him, he was unwilling to say this condition was work-related. And he further testified that he found no evidence of injury to claimant's shoulders or to her knee.

After considering the 3 alleged accidents and the significant amount of testimony and medical evidence in this case, the ALJ concluded that claimant had established that

⁷ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

she sustained a single accident, that being a series of traumas to her upper extremities attributable to her repetitive work activities each and every working day through September 23, 2003, when she ceased working at her regular duties. He adopted the opinions of Dr. Mills, the court-order examiner, granting her a 12 percent whole body permanent impairment and he computed her compensation based upon her full-time wages, including fringe benefits.

The Board has carefully considered the entire record and concludes that claimant has sustained her evidentiary burden only as to her repetitive injuries to her upper extremities. The nature of the work claimant described substantiates her upper extremity claims. However, her nebulous neck, back and lower extremity claims are inconsistent and largely unexplained. It appears claimant had an earlier workers compensation claim involving her back, and that at least some of the complaints she has voiced over the course of these claims are very similar to her earlier problems. Thus, the ALJ's finding that claimant suffered only a bilateral upper extremity injury and resulting impairment of 10 percent to each upper extremity while working for this respondent is affirmed. Like the ALJ, based upon this record the Board is unpersuaded by the opinions of Dr. Fevurly and Dr. Murati.

And while the Board affirms the ALJ's adoption of Dr. Mills' permanent impairment ratings of 10 percent to each upper extremity, the Board must nevertheless modify the method of computation consistent with the principles set forth in the Kansas Supreme Court's recent opinion in *Casco*. Accordingly, claimant's recovery in this matter is limited to two scheduled injuries rather than as a whole body.⁸ Thus, the calculation of her benefits must be modified and will be based upon her compensation as of September 19, 2003, her last date worked at her regular job.

Although the value of the fringe benefits are known, the record is unclear as to what date the fringe benefits ceased. The Board believes it is reasonable to conclude that claimant's fringe benefits ceased as of the time she was terminated. Thus, under K.S.A. 44-511, her average weekly wage will increase from \$412.15 to \$679.65 as of July 19, 2004, to the extent any weeks are left to be paid out.

The Board notes that the ALJ did not award claimant's counsel a fee for his services. The record does not contain a fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires that the Director review such fee agreements and approve such contract and fees in accordance with that statute. Should claimant's counsel desire a fee

⁸ Because claimant's injury is limited to two scheduled impairments, this also renders moot claimant's claim for a work disability.

MONA S. CARTHEL

**DOCKET NOS. 1,013,468; 1,017,171;
1,017,386**

be approved in this matter, he must submit his contract with claimant to the ALJ for approval.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated February 26, 2007, is affirmed in part and modified as follows:

DOCKET NO. 1,013,468

The claimant is entitled to 21.00 weeks of permanent partial disability compensation, at the rate of \$274.78 per week, in the amount of \$5,770.38 for a 10 percent loss of use of the right arm.

DOCKET NO. 1,017,386

The claimant is entitled to 21.00 weeks of permanent partial disability compensation, at the rate of \$274.78 per week, in the amount of \$5,770.38 for a 10 percent loss of use of the left arm.

IT IS SO ORDERED.

Dated this _____ day of July 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Attorney for Claimant
Christopher J. McCurdy, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge